82-1099

CASE NO. _____

Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FULTON COUNTY JAIL (Staff)
Atlanta, Georgia,

Petitioner,

vs.

MOSES FRYER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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I.

QUESTIONS PRESENTED FOR REVIEW

1. May a prisoner who fails to follow the procedures of the Federal Rules of Civil Procedure, as well as the extraordinary procedures authorized by the District Court in handling *pro se* prisoner cases, convert, by a purported amendment, his interest in conditions at the Fulton County Jail as part of a quasi-class action, into an individual lawsuit for damages against specifically named defendants and non-specified defendants in the absence of service of process or summons upon any named defendants, as required by law, merely by sending a letter or letters claiming damages?

2. Is such a purported amendment filed by a prisoner, proceeding *in forma pauperis*, under 42 U.S.C.A. 1983 which is filed after transfer from the Fulton County Jail into State custody sufficient to distinguish this prisoner's case from that of the prisoner in *Preiser v. Newkirk*, 422 U.S. 395 (1975), where the Court held that the doctrine of mootness applied when that prisoner was no longer incarcerated in the facility which was the subject of his complaints when he had no other claims before the court?

3. Did the Court of Appeals for the Eleventh Circuit go beyond the parameters of Appeal and overlook the rights of the named Defendants by holding that Fryer had stated a claim for damages under 42 U.S.C.A. 1983, when that issue had not been considered by the District Court?

II.

LISTING OF PARTIES

Fulton County Jail (Staff), Atlanta, Georgia

Dr. Calvin A. Brown, Doctor for Fulton County Jail

Hospital Deputy Shaeffer

Chief Jailer Nick Eason

"Paramedic" Mr. Gordon

Sheriff Leroy Stynchcombe

Moses Fryer

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MOSES FRYER,
Respondent.

IV.

STATEMENT CONCERNING REPORTS

There have been no known reports of any opinion delivered in this case.

V.

STATEMENT OF JURISDICTION

(a) Petitioner seeks review of an order and opinion entered by The United States Court of Appeals for the Eleventh Circuit on October 8, 1982, reversing and remanding dismissal of Respondent Fryer's action by The United States District Court of the Northern District of Georgia.

(b) Rehearing was denied by Order dated November 12, 1982.

(c) The statutory provision believed to confirm this Court jurisdiction to review the judgment or decree in

question by Writ of Certiorari is 28 U.S.C.A.1254(1).

VI.

CONSTITUTIONAL AND STATUTORY PROVISIONS FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Process

(a) **Summons: Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to any other person authorized by Rule 4(c) to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) **Same: Form.** The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(c) **By Whom Served.** Service of process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely. Service of process may also be made by a person authorized to serve process in an action brought in

the courts of general jurisdiction of the state in which the district court is held or in which service is made.

(d) **Summons: Personal Service.** The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to

an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United

States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdividion (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

(g) **Return.** The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. Failure to make proof of service does not affect the validity of the service.

(h) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) **Alternative Provisions for Service in a Foreign Country.**

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service is either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by

the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1) (D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 1980, eff. Aug. 1, 1980.

Rule 15. Amended and Supplemental Pleadings

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a repsonsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

UNITED STATES CODE ANNOTATED

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 21—CIVIL RIGHTS

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordi-

nance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisidction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 121—FEES AND COSTS

§ 1915. Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

* * *

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

CHAPTER 81—SUPREME COURT

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Superme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

VII.

STATEMENT OF THE CASE

Moses Fryer filed a Petition for Declaratory and Injunctive Relief requesting that the Court allow him to proceed *in forma pauperis* on February 12, 1976. Judge William C. O'Kelly of the United States District Court for the Northern District of Georgia entered an Order on February 20, 1976, allowing said Petition to be filed *in forma pauperis* and providing that the matter be referred to Allan L. Chancey, United States Magistrate, "for consolidation and handling with other cases involving *conditions of confinement* at the Fulton County Jail." (Emphasis supplied). The Petition requested that the District Court declare conditions at the jail unconstitutional pursuant to 28 U.S.C.A. 1983 and that Fryer receive certain medical treatment which he preferred. The Order allowing the Petition to be filed did not require an answer on behalf of the named individuals nor did it require a summons or service of process. No service was had and no separate case was ever commenced against the individually named Defendants. The Petition had been filed despite the fact that it did not contain the Affidavit required under 28 U.S.C.A. Section 1915(a). The Order was narrowly drawn and gave Fryer an interest only in

conditions of confinement at the Fulton County Jail. The original Petition contained no mention of damages nor did a subsequent letter which was filed at the same time as the original petition. No response to the petition was required, and none was made.

While the issues relative to the conditions at the Fulton County Jail were under consideration by the Magistrate, Fryer was transferred out of the Fulton County Jail on April 16, 1976, into the custody of the State of Georgia. In his letter notifying the District Court that he had been transferred out of Fulton County Jail, Fryer stated that he was entitled to damages in the amount of $100,000.00. However, this letter was never served upon attorneys representing Fulton County. Further, no Order was ever issued permitting such an amendment nor was process issued summoning the individually named defendants into court in accordance with the Federal Rules of Civil Procedure or due process. Subsequently, upon notification that Fulton County had changed attorneys, Fryer moved for appointment of counsel and other relief, repeating his allegations once again. The County attorneys responded contending that Fryer was not entitled to an attorney nor to any of the other relief requested. After this pleading, Fryer filed several pleadings and briefs in which he alleged that he was seeking damages and raised the amount to $3,000,000.00. Although these pleadings were served upon the County attorneys, there was no Order allowing amendment and no process issued.

The County attorneys moved to dismiss Fryer's interest on the basis of mootness because Moses Fryer was no longer incarcerated in the Fulton County Jail and no longer had an interest in conditions of confinement at that jail. Judge Marvin H. Shoob correctly, petitioner con-

tends, dismissed Fryer's action finding that his claims were moot becuase he was no longer confined in the Fulton County Jail and had no further interest in the conditions of confinement. Fryer moved to vacate this Order and for permission to appeal *in forma pauperis* contending that his damage claim defeated mootness. Judge Shoob denied both motions holding that mootness was obvious and that he could not certify the appeal as being taken in good faith despite the apparent subjective good faith of Fryer. There was no issue of damages properly before the District Court.

Subsequently, the Court of Appeals for the Eleventh Circuit permitted Fryer to file his appeal *in forma pauperis* despite the District Court certification that the appeal was not taken in good faith. See 28 U.S.C.A. 1915(a). On October 8, 1982, a panel of that Court entered an Order reversing and remanding the Trial Court's dismissal of Fryer's action. The Court of Appeals held that the various letters mentioning a claim of damages were to be construed as amendments, although the original mention of damages was in an unserved letter mailed after Fryer had been transferred from the Fulton County Jail. The Court of Appeals held these purported amendments prevented a finding of mootness under *Preiser v. Newkirk, supra* and held that Fryer had stated a claim for damages against the individually named defendants where the individually named defendants had never been served with process and the only attorneys who were even arguably aware that Fryer had filed a Petition and attempted to amend it were the Fulton County attorneys representing the County in a class action concerning conditions of confinement at the Fulton County Jail before the Magistrate.

In effect, the Court of Appeals held that Fryer's inter-

est was not moot, even though he no longer was confined at the Fulton County Jail, because of a purported amendment which was not served nor ordered filed by the District Court, but which the Court of Appeals treated as an amendment converting Fryer's interest as a member in a class into an individual action for damages against individually named defendants who were never served with process, never entered an appearance and never had any input into the consideration of this case. The Court then went further and held that Fryer had stated a claim for damages against the individually named defendants when many questions, including the propriety of allowing an amendment, had not been litigated in the District Court. A Petition for Rehearing and Suggestion for *En Banc* Consideration were denied on November 12, 1982.

VIII.

BASIS FOR JURISDICTION IN DISTRICT COURT

Fryer had originally filed a *pro se* Petition *in forma pauperis* under 42 U.S.C.A. Section 1983, which was ordered filed by Judge O'Kelly of the Northern District of Georgia pursuant to 28 U.S.C.A. Section 1915(a).

IX.

ARGUMENT

This case presents a straightforward question of what defendants' rights are in a Section 1983 case filed by an indigent. The Federal District Courts and the Courts of Appeal, specifically The Northern District of Georgia and the Eleventh Circuit, have, pursuant to *Haines v. Kerner*, 404 U.S. 519 (1972), followed a practice of giving liberal treatment to the pleadings of *pro se* petitioners in

Section 1983 cases. See e.g. *Watson v. Ault*, 525 F2d. 886 (5th Cir. 1976).[1] Additionally, the courts have sanctioned the use of extraordinary procedures as a supplement to the "familiar processes of pretrial practice under the Federal Rules of Civil Procedure". *Hardwick v. Ault*, 517 F2d. 295, 298 (5th Cir. 1975). The benefit of these extraordinary procedures and the liberal reading given to *pro se* pleadings has been directed entirely at insuring that plaintiffs' rights were recognized even to the point of ignoring defendants' rights. The instant case demonstrates a clear situation where concern has led to the liberal treatment for a *pro se* plaintiff in violation and derogation of defendants' rights.

Hardwick v. Ault, supra, refers to various procedural innovations that may readily separate meritorious claims from frivolous claims while encouraging informal settlements of grievances and preserving plaintiffs' rights under 42 U.S.C.A. 1983. Id. at 298. That case refers to a report prepared by the Federal Judicial Center concerning proposals for more efficient processing of these cases. *Hardwick v. Ault, supra* at 298. That Court stated, however, that: "To the extent that requiring such 'special reports' does not divest the Section 1983 plaintiff of any rights he enjoys under the Federal Rules of Civil Procedure and the non-exhaustion doctrine, it would appear to be a worthwhile innovation." *Hardwick v. Ault, supra* at 298. In other words, these extraordinary procedures are to be developed in order to aid plaintiffs, however,

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[1] Decisions of the United States Court of Appeals for the Fifth Circuit which were handed down prior to the close of business on September 30, 1981, are binding as precedent on the United States Court of Appeals for the Eleventh Circuit and on the district courts in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F2d. 1206 (11th Cir. 1981).

they must not conflict with the Federal Rules of Civil Procedure. At the same time, the liberality afforded to *pro se* pleadings gives *pro se* plaintiffs an additional protection from the technical requirements of the Federal Rules of Civil Procedure. See *Haines v. Kerner, supra.*

It is our contention that in Fryer's case, these disparate elements were erroneously used by the Eleventh Circuit Court of Appeals to violate defendants'[2] basic rights. After being permitted to, in effect, join a class action concerning "conditions of confinement at the Fulton County Jail" by Judge O'Kelly of the Northern District of Georgia, Fryer took no immediate action. The Fulton County attorneys, recognizing that no service of process was had against individually named defendants involving Moses Fryer, proceeded in accordance with the original Order allowing Fryer's Petition to be filed by representing the County before the Magistrate. When Fryer was transferred from the Fulton County Jail into State custody, he sent a letter to the Magistrate demanding damages and notifying the Court of his change of address. This letter was never served upon County attorneys and no Order was ever entered permitting Fryer to amend his complaint and convert his action from an interest in the class action into an individual action. Such an order was required under Rule 15(a) of the Federal Rules of Civil Procedure and, more basically, by fundamental due process. The individual defendants were entitled to notice and to be brought into Court in accordance with Rule 4 of the Federal Rules.

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[2] The listing of parties in this case varies from the caption. Fryer's original pleadings had several different captions including those listed by the Court of Appeals and those added to our list. Because no one has been served with process, it is unclear who the parties really are.

Subsequently, Fryer sent more letters and other pleadings to the Court raising the level of damages claimed from $100,000.00 to $3,000,000.00. No Order permitting such amendment was ever entered and no process was issued. When the County attorneys filed their motion to dismiss based upon mootness pursuant to *Preiser v. Newkirk*, *supra*, the District Court dismissed Fryer's interest in the class based upon mootness.

Because they were never served, the individually named defendants have been denied the right to litigate this action with counsel of their own choosing. Because of the Court's holding that a cause of action was stated against the defendants, they have been precluded from any pretrial litigation on this issue and may be required to go to trial on this action, which petitioner contends is frivolous. The question of whether these purported amendments should have been allowed was not even considered by the trial court as contemplated by Rule 15(a). The 11th Circuit's holding prevents the County from demonstrating the frivolous nature of amendments claiming that the County caused Fryer to contract Herpes-simplex because of inadequate medical treatment. See 28 U.S.C.A. 1915(d).

Nevertheless, the Eleventh Circuit, giving Fryer the full benefit of both *Haines v. Kerner*, *supra* and the District Court's extraordinary procedures, held that Fryer's unserved pleading was an amendment sufficient to convert his interest in the class action into an individual suit against individually named defendants and that a cause of action had been stated against those individuals despite the fact that they had never been served with nor waived process and many issues involved in such a determination have never been litigated. The result is that plaintiff has

been given the full benefit of the Federal Rules, the holding of *Haines v. Kerner, supra*, and any extraordinary procedures designed by the District Court for use in Section 1983 cases while the defendants have not even been summoned into court. In reality, the only party who has litigated this action is Fulton County, denominated as the "Fulton County Jail (Staff) Atlanta, Georgia" by its participation in the class action.

It is clear under *Preiser v. Newkirk, supra*, that Fryer's interest in the conditions of confinement at the Fulton County Jail is moot and that no individual judgment may be recovered against such a party as the "Fulton County Jail (Staff) Atlanta, Georgia". Accordingly, the Court erred in not affirming the District Court's dismissal. By allowing an amendment which effectively omitted requirements of service and further holding that a cause of action against the individually named defendants had been stated, that Court has left the standards of procedure skewed totally in favor of *pro se* plaintiffs while ignoring defendants' rights to proceed under uniform rules of procedure which may be readily understood in advance. Although it has been stated that *pro se* litigants are not to be advantaged merely because of *pro se* status *Campbell v. Beto*, 460 F2d. 765, 769 (5th Cir. 1972), the holding of this case shows otherwise. The Court of Appeals went beyond the parameters of judicial authority when it required the letters asserting damages to be considered amendments when same had not been sanctioned or considered by the District Court or served upon opposing parties. It was impossible for the County attorney to even respond to this possibility in the Court of Appeals because this was never an issue in the District Court. The Court of Appeals brushes this problem aside by stating that the named defendants had "actual notice" of the

claim for damages. Appendix A. p. 3a, n. 1. Nevertheless, the fact that a defendant has received actual notice will not suffice if service has not been in the manner prescribed by the Federal Rules of Civil Procedure. *Martin v. N.Y. State Department of Mental Hygiene*, 588 F2d. 371 (2nd Cir. 1978). Additionally, the record fails to confirm the allegation of "actual notice".

Taylor v. Gibson, 529 F2d. 709 (5th Cir. 1976), states that once the *pro se* complaint is filed pursuant to 28 U.S.C.A. 1915(a) the case should proceed in accordance with the Federal Rules of Civil Procedure. Id. at 717. This requirement is ignored in Fryer's case as an unserved letter was found to constitute an amendment. The effect of this holding is to convert Fryer's interest in an equitable class action into an individual suit for damages. If this holding remains in effect other class members may likewise convert their interest into an individual lawsuit without the intervention or guidance of the court. Defendants in this and other cases will be unable to predict whether any pleading will be considered a waiver of service as to them or will otherwise compromise their rights under the Federal Rules.

It is submitted that this departure from the accepted and usual course of judicial proceedings by the Court of Appeals and the consequent misapplication of *Preiser v. Newkirk*, *supra*, to these facts merits review by this Court. Permitting the total disregard for procedure evidenced by Fryer sets a grave precedent which will not go unnoticed by the Courts, local officials, or, most significantly, by the multitude of prisioners who stand to benefit from this loosening of already weak standards applied to *pro se* cases. See *Taylor v. Gibson*, *supra*.

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted and the decision of the Court of Appeals be reversed so that the District Court's dismissal of the *pro se* prisoner's action because of mootness be affirmed.

Respectfully submitted,

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